IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 243 of 2005

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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BIRLA VXL LIMITED - Applicant(s)
Versus
_____ - Respondent(s)

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Appearance :
MR MIHIR THAKORE & MR SN SOPARKAR, SENIOR ADVOCATES WITH MR SANDEEP SINGHI FOR SINGHI & CO for Petitioner No(s).: 1.

MR MIHIR JOSHI WITH MR DEVANG NANAVATI FOR NANAVATI & NANANAVATI ASSOCIATES FOR Exim Bank.

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CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date : 18/07/2005

ORAL JUDGMENT

1. The applicant, namely, Birla VXL Limited has taken out this Judge's Summons praying for direction for convening the meeting of Unsecured Creditors of OCM Division of the applicant Company, being transferred to OCM (India) Limited for the purpose of considering and if thought fit, approving with or without modification, the Scheme of Arrangement between the applicant Company and its Existing Lenders, Creditors and Shareholders and OCM India Limited and its Shareholders. The applicant has also prayed for the extension of the period for filing Company Petition in terms of Rule 79 of the Companies (Court) Rules, 1959 for a period of 7 days from the date of filing Chairman's report of the meeting of the Unsecured Creditors of OCM Division of the applicant Company in terms of prayer (a) of the Judge's Summons.

2. An affidavit is filed by Shri Girish Bhatia, Company Secretary of the applicant Company. Mr. Mihir Thakore & Mr. S.N. Soparkar, learned Senior advocates appearing with Mr. Sandeep Singhi, learned advocate for the applicant have submitted that the applicant had earlier filed Company Application No. 171 of 2005 inter alia praying for convening separate meetings of Existing Lenders, Equity Shareholders, Preference Shareholders and Unsecured Creditors of the applicant Company to consider and if thought fit, approve with or without modification, the said Scheme. This Court vide its order dated 10.05.2005 has disposed of the said application directing to hold separate meetings of the Existing Lenders, Equity Shareholders, Preference Shareholders and Unsecured Creditors of the applicant Company on 25.06.2005 at the Regd. office of the applicant Company. Pursuant to the said order, separate meetings of Existing Lenders, Equity Shareholders, Preference Shareholders and Unsecured Creditors of

the applicant Company were held at the Regd. office of the applicant Company on 25.06.2005. The said Scheme was unanimously approved by requisite majority by the Existing Lenders and unanimously by the Equity Shareholders, Preference Shareholders and Unsecured Creditors respectively. The Chairman of the meeting has also filed his report before this Court.

3. Mr. Thakore has further submitted that the Scheme proposed does not envisage any compromise or arrangement for all the Unsecured Creditors of the applicant Company. There was no need for the applicant Company to convene the meeting of all the Unsecured Creditors. The Scheme envisages de-merger of the OCM Division of the applicant Company into OCM (India) Limited. For the purpose of considering this de-merger, only a meeting of the Unsecured Creditors of the OCM Division was required to be convened. In Company Application No. 171 of 2005, the applicant Company applied for

convening meeting of its Unsecured Creditors without appreciating that the Scheme does not envisage any Compromise or Arrangement with the Unsecured Creditors of the applicant Company other than the Unsecured Creditors of OCM Division, being transferred pursuant to de-merger to OCM (India) Limited.

4. Mr. Thakore has further submitted that the Exim Bank has filed Company Application No. 230 of 2005 inter alia praying for recalling of the order dated 10.05.2005 passed in Company Application No. 171 of 2005 and for holding a fresh meeting of all classes of Companies, namely, Equity Shareholders, Preference Shareholders, Secured Creditors, Existing Lenders and Unsecured Creditors including the applicant and other like Creditors of the Company, under Section 391 (1) of the Companies Act, 1956 for the purpose of considering the proposed arrangement between the OCM (India) Ltd. and its Existing Lenders. The Exim Bank in the

said application has contended that it has not been called at the meeting of Unsecured Creditors to consider the proposed arrangement. Mr. Thakore has submitted that the applicant Company, without admitting that the said Exim Bank or similarly situated persons are the Unsecured Creditors of the applicant Company or were required to be called at the meeting of Unsecured Creditors, is of the view that the meeting of Unsecured Creditors was erroneously convened and the only meeting which was required to be convened was of the Unsecured Creditors of OCM Division, being transferred to OCM (India) Limited. The alleged liability of EXIM Bank, irrespective of its status is not being transferred on de-merger of OCM Division to OCM (India) Limited. In order to expedite the process, the applicant Company explored the option of counting the votes of only the Unsecured Creditors of OCM Division, being transferred to OCM (India) Limited under the Scheme, present and voting at the meeting held on

25.06.2005, excluding the votes of other Unsecured Creditors. However, it was found that the requisite quorum of such Unsecured Creditors was not available. Hence, the applicant Company was constrained to approach this Court for convening the meeting of the Unsecured Creditors of OCM Division, being transferred to OCM (India) Limited. Mr. Thakore has, therefore, submitted that the meeting of the Unsecured Creditors of the OCM Division of the applicant Company, being transferred to OCM (India) Limited under the Scheme may be permitted to be held at the Regd. office of the applicant Company or at such other place as this Court may direct and on such date or dates and such time as this Court may direct and that Chairman may be appointed for the meeting to be held.

5. Since this application is ordered to be heard along with Company Application No. 230 of 2005 and directions sought for in the present application,

if issued, are likely to affect the interest of the Exim Bank, the applicant in Company Application No. 230 of 2005, the Court has allowed Mr. Mihir Joshi, learned Senior counsel appearing with Mr. Devang Nanavati, learned advocate for the Exim Bank to make his submissions in the matter. Mr. Joshi has submitted that the applicant Company has intentionally moved the present application especially when the objections were raised by the Bank in Company Application No. 230 of 2005 and prayed before this Court to recall the order passed on 10.05.2005 in Company Application No. 171 of 2005. To keep away the applicant from the meeting of the Unsecured Creditors, initially no notice was issued on the Exim Bank and now this second application is filed on the ground that earlier meeting of the Unsecured Creditors was erroneously held and the Scheme envisages only the Unsecured Creditors of the OCM Division of the applicant Company which is to be demerged and transferred to OCM (India)

Limited. He has, therefore, submitted that such an application is not maintainable under Section 391 of the Companies Act, 1956. Once the applicant Company itself has sought the direction from this Court to convene the meeting of the Unsecured Creditors of the applicant Company and the meeting is accordingly held and the Scheme is unanimously approved by the Unsecured Creditors at the said meeting, it is not open for the applicant Company now to abandon the said meeting and move the second and separate application for convening the meeting of the Unsecured Creditors of the OCM Division of the applicant Company. Such a classification at this stage is neither just, proper nor it is legal and equitable. He has, therefore, submitted that this Court should not grant any direction for convening of the meeting of the Unsecured Creditors of the OCM Division of the applicant Company.

6. Mr. Joshi has further submitted that the earlier

order passed by this Court on 10.05.2005 in Company Application No. 171 of 2005 operates with its full force. The applicant Company has acted on the basis of that order and achieved the desired result at the meeting. Such Scheme is unanimously approved by the Unsecured Creditors of the applicant Company. It is only when the Exim Bank has raised certain objections and challenged the Classification of Unsecured Creditors made by the applicant Company by keeping away the Exim Bank from the meeting, the applicant Company has realised that it has erroneously convened the meeting of the Unsecured Creditors of the Company instead of convening the meeting of Unsecured Creditors of the OCM Division which is to be demerged and transferred to OCM (India) Limited. Such a course is not open for the applicant Company and it is also barred by principles of res judicata as well as the principle of estoppel.

7. Mr. Joshi has further submitted that this Court

has ample jurisdiction either to reject the present application at the threshhold or to give suitable directions for convening the meeting of the Unsecured Creditors. Rule 69 of the Company (Court) Rules, 1959 was considered by this Court in the case of **SHREE RAMA MULTITECH LTD. in Company Application No. 01 of 2005 decided on 24.02.2005** and in the case of **Essar Oil Limited, Company Application No. 217 of 2005 decided on 30.06.2005** and has taken the view that the plain reading of Rule 69 itself makes it clear that the powers are conferred on the Company Judge even to dismiss the Summons at the stage of hearing of Summons. The Court has further taken the view that the observation made by the Hon'ble Supreme Court in the case of **RAINBOW DENIM LIMITED V/S. RAMA PETRO [2003] 116 COMPANY CASES 641 [S.C.]** does not lay down any precedent and the said observations are confining to the facts of the said case. The Court has further observed that the Court has ample power within the meaning of

Rule 69 to dismiss the Summons at the initial stage if prima facie it appears to the Court that the application is not sustainable or is palpably in contravention of the provisions of the Act. In such case, the Court does not show any indulgence for issuance of directions to convene the meeting. Mr. Joshi has, therefore, submitted that this being the second application, moved only with a view to exclude the Exim Bank is not sustainable and it is palpably in contravention of the provisions of the Act and hence, this Court should not entertain this application. Even otherwise, the Scheme is adversely affecting the rights of all the Unsecured Creditors and hence, there is no justification in convening the meeting of only Unsecured Creditors of the OCM Division. The Scheme itself envisages the transfer of assets from applicant Company to OCM (India) Limited. It is stated in the Preamble of the Scheme that as part of business restructuring OCM Division is proposed to be spun off into a separate Company,

namely, OCM India Limited, a wholly owned subsidiary of the applicant Company. It is also proposed that the OIL loans transferred to OCM (India) Limited shall be settled through disposal of undertaking of OIL on a going concern basis or through disinvestment by the applicant Company of the shares held in, and those being issued to it by OIL under the Scheme. The Company has also proposed in the Scheme to unlock value in its specified investments and non-core assets under the Scheme, through carving out a separate and distinct division as investment division in the applicant Company to which specified investment and non-core assets, liabilities along with Ico loans in terms of this Scheme will be allocated. It is also proposed that the net consideration realised on sale of the said investments / assets shall be utilised in making full and final settlement of Ico allocated to the investment division. On the basis of these Provisions which are made in the Scheme itself, Mr. Joshi has

submitted that the Unsecured Creditors are directly concerned with these provisions and hence, they are required to be participated at the meeting. He has, therefore, submitted that even if this Court inclines to issue the direction to the Company to convene the meeting of the Unsecured Creditors, in that case, the meeting should not be restricted to only those Unsecured Creditors of the OCM Division of the applicant Company but the meeting should be convened of all the Unsecured Creditors of the applicant Company, irrespective of the fact as to whether any Scheme has been offered to them or not. Even as per the Company's own perception, the arrangement is proposed to all Unsecured Creditors as the OCM Division is transferred and certain Unsecured Creditors alleged to be the Unsecured Creditors of the OCM Division are also transferred to OCM (India) Limited. Likewise the other Unsecured Creditors are retained with the applicant Company with restructured loan and hence, this arrangement

would also cover all Unsecured Creditors of the Company. He has, therefore, submitted that the Unsecured Creditors being a separate class by itself should not further be sub-classified only with a view to achieve an ill-motive by excluding the applicant Exim Bank from the said meeting. He has, therefore, submitted that suitable directions be issued either to reject this application or for convening the meeting of all the Unsecured Creditors of the applicant Company.

8. Mr. Mihir Thakore, learned Senior advocate appearing for the applicant Company, in rejoinder, has submitted that none of the objections raised by the Exim Bank is sustainable. Even otherwise, this is not the stage where these objections are to be considered by this Court. The case of the Exim Bank does not fall within the exceptions carved out by this Court while deciding Company Application No. 01 of 2005 as well as Company Application No. 217 of 2005 in the cases of Rama

Multitech and Essar Oil Limited, respectively. No sooner, the Company felt that the earlier meeting was erroneously convened, the second application is moved and it is always open for the applicant to seek any direction or modification in the Scheme. Before filing the substantive petition before this Court pursuant to the meetings earlier held, the applicant Company has come before this Court by way of the present application and sought the direction for convening the meeting of only those Unsecured Creditors of the OCM Division which is to be demerged and transferred to OCM (India) Limited. In support of his submissions, he relied on the decision of Bombay High Court in the case of **P & P AUTO INDUSTRIES LIMITED, In Re. [1994] 80 COMPANY CASES 289** wherein it is held that Section 391 of the Companies Act, 1956 invests the Court with powers to approve or sanction a Scheme of amalgamation / arrangement which is for the benefit of the Company. In doing so, if there are any other things which, for

effectuation, require a special procedure to be followed - except reduction of capital - then the Court has power to sanction them while sanctioning the Scheme itself. It would not be necessary for the Company to resort to other provisions of the Companies Act or to follow other procedures prescribed for bringing about the changes requisite for effectively implementing the Scheme which is sanctioned by the Court. Not only is Section 391 a complete code, but it is intended to be in the nature of a “Single Window Clearance” to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the Court for various other alterations or changes which might be needed effectively to implement the sanctioned Scheme whose over all fairness and feasibility has been judged by the Court under Section 394 of the Act.

9. Mr. Thakore has further relied on the decision of this Court in the case of **GUJARAT LEASE FINANCING**

LIMITED, In Re. [2002] 36 SEBI & CORPORATE LAWS REPORTS 838 wherein the Court has taken the view that Section 391 of the Act itself permits compromise between the Company and a class of its Creditors and it is not necessary that the compromise must be between the Company on the one hand and all its Creditors on the other hand. Mr. Thakore has, therefore, submitted that there is no infirmity in moving the present application for seeking direction of convening the meting of Unsecured Creditors of the OCM Division of the applicant Company. Mr. Thakore has further submitted that even if it is assumed that the Exim Bank and other Creditors of a like nature may be adversely affected by the proposed Scheme, this is not the stage to consider their objections, but at the time when the substantive petition is filed by the Company, the Court can certainly go into the merits of those objections and if ultimately, the Court is of the view that the Scheme is not just and proper or the classification made by the

Company is also not just and proper, the Court may reject the Scheme or may direct the Company to reconvene the meeting of the Unsecured Creditors. The directions sought for by the Company in the present application be therefore, granted and the applicant be permitted to convene the meeting of the Unsecured Creditors of the OCM Division of the applicant Company.

10. After having heard learned Senior Counsels appearing for the respective parties and after having considered their rival submissions and the authorities cited before the Court, the Court is of the view that the applicant Company has earlier filed Company Application No. 171 of 2005 seeking direction for convening the meeting, inter alia of Unsecured Creditors of the Company. The Court has allowed the said application vide its order dated 10.05.2005 and pursuant to the said order, the meeting was convened and the Unsecured Creditors have unanimously approved the Scheme. The

Chairman has also filed his report to that effect. The need for filing the present application arises only when the Exim Bank has filed Company Application No. 230 of 2005 before this Court praying for recalling of the order dated 10.05.2005 passed in Company Application No. 171 of 2005 and pointed out that though the Exim Bank is Unsecured Creditor, no notice has been issued on the Bank. It is the case of the applicant Bank that the Exim Bank is a Contingent Creditor and liability is still not crystallized. However, without entering into that controversy and without filing any substantive petition before this Court, the applicant Company has filed the present application wherein it is categorically stated that the meeting of the Unsecured Creditors was erroneously convened as the Scheme does not envisage any proposal to all the Unsecured Creditors of the Company. The Scheme is only in respect of the Unsecured Creditors of the OCM Division which is to be demerged and transferred

to OCM (India) Limited. By adopting this practice, the applicant Company can very well eliminate the Exim Bank and other Unsecured Creditors and can achieve the desired result which could not have otherwise been achieved. The intention of the applicant Company, therefore, does not seem to be genuine and bonafide. It appears to the Court that the applicant Company does not want in any case to allow the Exim Bank to participate in the meeting of the Unsecured Creditors for considering the Scheme of Arrangement and Compromise. Initially, Exim Bank was kept away on the ground that the Exim Bank is a Contingent Creditor and now it is on the ground that the Exim Bank is not the Unsecured Creditor of OCM Division and the Scheme is offered to only those Unsecured Creditors who are the Unsecured Creditors of OCM Division of the applicant Company. The Court does not approve this course of action as the earlier application moved by the applicant Company is fully exhausted. Directions

were sought for. The meeting was convened. The said meeting has unanimously approved the Scheme and the Company is now supposed to file a substantive petition before this Court based on the outcome of the said meeting. Instead of doing that the Company has moved present application knowing it fully well that the said Scheme is strongly to be objected to by the Unsecured Creditors like the Exim Bank and it is very difficult for the Company to sustain the Scheme before the Court. The applicant Company has neither invited the Exim Bank in the meeting nor it allows Exim Bank to reach at the stage where the Exim Bank can raise its voice and objects the Scheme as the Company has not filed the substantive petition before this Court.

11. Looking to the peculiar position of this case which the Court considers to be an exceptional case and without expressing any opinion on the other contencious issues raised by the parties,

the Court is of the opinion that the Exim Bank should not be deprived of its legitimate right of participating in the meeting of the Unsecured Creditors being a class by itself and very well contemplated within the meaning of Section 391 of the Companies Act, 1956 and vitally concerned with the demerger and transfer of OCM Division of the applicant Company to OCM (India) Limited. The Court, therefore, hereby issues the following directions :-

1. The meeting of all the Unsecured Creditors including the Exim Bank and other like Creditors of the applicant Company shall be convened and held at the Regd. Office of the applicant Company at Aerodrome Road, Jamnagar – 361 006, Gujarat on Wednesday the 31st day of August, 2005 at 11.00 a.m. for the purpose of considering, and if thought fit, approving with or without modification, the arrangement embodied in the Scheme of Arrangement between Birla VXL Limited

and its Existing Lenders, Creditors and Shareholders and OCM India Limited and its Shareholders.

2. At least 21 clear days before the day appointed for the meeting to be held as aforesaid, an advertisement convening the said meeting indicating the day, the date, the place and time aforesaid and stating that copies of the said Scheme of Arrangement, the statement required to be furnished pursuant to Section 393 of the Companies Act, 1956 and Form of Proxy can be obtained free of charge at the Registered office of the applicant Company or at the office of its Advocate, M/s. Singhi & Co., 7-8 Premchand House Annexe, Ashram Road, Old High Court Way, Ahmedabad – 380 009, be inserted once in English edition of The Tribune, Chandigarh Edition and Punjabi Edition of Punjabi Tribune, Chandigarh Edition and also in English Newspaper Indian Express, Ahmedabad Edition and Gujarati

Newspaper, Saurashtra Samachar. Publication of the Advertisement in the Gujarat Government Gazette is dispensed with.

3. In addition, at least 21 clear days before the date of the meeting to be held as aforesaid, a notice convening the said meeting, indicating the day, the date, the place and time aforesaid, together with a copy of the said Scheme of Arrangement, a copy of the Statement required to be furnished pursuant to Section 393 of the Companies Act, 1956 and the prescribed Form of Proxy, shall be sent by prepaid letter post under Certificate of Posting addressed to each of the Unsecured Creditors of the applicant Company at their respective last known addresses. The notice shall be sent to the Unsecured Creditors of the applicant Company with reference to the list of persons appearing on the record of the Applicant Company as on 30.06.2005 and also to the Exim Bank and other like Creditors of the

Company.

4. The settling and/or approval of the advertisement, the form of Notice and the Statement to accompany the Notice by the Registrar of this Court is dispensed with.

5. **DR. G. Goswami,** Director of the applicant Company, and failing him **Mr. A.C. Mukherji,** Director of the applicant Company, and failing him **Mr. C.L. Rathi**, Director of the applicant Company shall be the Chairman of the aforesaid meeting to be held on **Wednesday, the 31th day of August, 2005** and the Chairman shall put the Scheme to vote in the said meeting without fail.

6. The Chairman appointed for the aforesaid meeting do issue the advertisement and send out the notices of the meeting referred to above. The Chairman is free to avail the services of the applicant Company or their Officers or Servants

or Agents or any other agency for carrying out the said direction. It is further directed that the Chairman of the meeting shall have all powers under the Articles of Association of the Applicant Company and under the Companies (Court) Rules, 1959 in relation to conduct of meeting including an amendment to the aforesaid Scheme of Arrangement and Compromise or resolutions, if any, proposed at the aforesaid meeting by any person(s) and to ascertain the decision of the aforesaid meeting on the poll.

7. The quorum for the aforesaid meeting shall be three (3) persons present in person.

8. The voting by proxy be permitted, provided that the proxy in the prescribed form duly signed by the person entitled to attend and vote at the meeting is filed with the Applicant Company at its Registered office at Aerodrome Road, Jamnagar – 361 006, Gujarat, not later than 48 hours

before the meeting.

9. The value of each Unsecured Creditors shall be in accordance with the books of the applicant Company and where the entries in the books are disputed, the Chairman shall determine the value for purposes of the meeting and his decision in that behalf shall be final. The Chairman shall, however, not dispute the eligibility of the Exim Bank and other like Creditors merely on the ground that they are Contingent Creditors.

10. It is further directed that the Chairman do report to this Court the result of the said meeting within 14 days of the conclusion of the meeting, and the said report shall be verified by his affidavit.

12. In view of the aforesaid directions, the Court hereby extends the period for filing Company Petition in terms of Rule 79 of Companies (Court)

Rules, 1959 for a period of 7 days from the date of filing Chairman's Report of the meeting of the Unsecured Creditors of the applicant Company in terms of the aforesaid directions.

13. In view of the aforesaid directions, this Company Application is accordingly disposed off, without any order as to cost.

[K.A. PUJ, J.]

Savariya